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IN THE

Supreme Court of the United States

October Term, [redacted] 1969

No. [redacted] 141

THOMAS T. TAGAWA,
Petitioner,

v.

MAUI PUBLISHING COMPANY, LTD.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

The petitioner THOMAS T. TAGAWA respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Hawaii entered in this proceeding on February 25, 1969.

OPINION BELOW

The opinion of the Supreme Court of Hawaii, not yet reported, appears in the Appendix hereto. No opinion was rendered by the Circuit Court for the Second Circuit (trial court), State of Hawaii.

JURISDICTION

The judgment of the Supreme Court of Hawaii was announced on December 3, 1968. A timely petition for rehearing was denied

on February 20, 1969, and the judgment of the Court was duly entered on February 25, 1969. This petition for certiorari was filed within 90 days of the entry of judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether under the "actual malice" test of the First and Fourteenth Amendments, where the defendant's state of mind at the time of publication is critical, summary judgment may be granted to the defendant solely on the basis of defendant's expressions of good faith.

2. Whether the "actual malice" test was correctly applied to the particular facts of this case, thereby justifying summary judgment.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT (1)

Congress shall make no law . . . abridging the freedom of speech or the press . . . . U.S.C.A. Constitution, Amendment 1-5, page 4.

AMENDMENT (14)

Section 1. * * * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws. *Id.*, page 6.

STATEMENT OF THE CASE

In January 1962, Plaintiff-Petitioner was a member of the Board of Supervisors of the County of Maui. Having served in this capacity since January 2, 1953, and as a member of the House of Representatives of the Territorial Legislature during the 1948-1950 term, Plaintiff was widely known in the county and elsewhere as a public official. Plaintiff is known as "Tom Tagawa" and also as "Honest Tom."

During the first week of January 1962, employees of the County of Maui, using county equipment, were observed paving the private driveways of two houses owned by Island Finance, Ltd. Plaintiff is the president, and a director and stockholder of the corporation.

On January 13, 1962, Defendant-Respondent, doing business as the "Maui News", published the following column:

"Country Chirps . . .
. . . By A Westside Bird

"SUCH A LOVELY RAIN as we have been having this past week end! Such a far cry from the 26-inch deluge in November. I do hope that not only does it cause growth in grass, plants and sugar cane but also in plans for the new bridge across Kahana Stream. This relatively simple little structure should not require hours and hours of engineering and the detour is rough, narrow and either dusty or sloppy with mud! Right now the dirt used to fill up the holes has worked out and one can hardly go over five miles per hour if one expects to have any teeth left.

"A few days ago I saw County road equipment grading and paving the driveways into those two new rental houses at Honokowai. You know, the ones owned by Tom Tagawa's company. For my tax dollar I would much prefer to see the County equipment used to fix up the rutting detour mentioned in the paragraph above. My own drive does not happen to need paving so I can honestly say I'd rather have the detour fixed up. Of course some of you readers with muddy driveways might prefer to have yours fixed up. All a matter of personal need, I guess.

"The letter from the Citizens Committee for Good Government regarding the astronomical increases in County Government costs was most thought-provoking. It drew a most indignant reply from our Supervisors who blamed all increases on the wage raises forced on the County by the Legislature. In reading the newspaper account I fail to see any mention of the increased cost of paving materials as well. Did you perchance forget that, Honest Tom?"

On January 26, 1962, Plaintiff filed a libel suit against the Maui Publishing Co. as the sole defendant, charging that the column falsely implied that he was using his official position improperly and dishonestly. To support his complaint, Plaintiff later furnished the affidavit of the county engineer who stated:

"That it has been and is the custom and practice of

his Department and the County of Maui to perform certain minor work upon and within private property upon the request of any private individual, such as the construction of driveways, excavation work, etc., after the receipt of a deposit based upon the estimated cost of such work, except that no such deposit is, and was in the past, required from a reputable firm or corporation and in such case work is and has been performed upon the understanding that the full cost will be paid upon the receipt of the invoice for same; provided that such work is done by the department only when its equipment and employees necessary therefor are engaged in performing county work in the immediate surrounding area;

"That during the month of January, 1962, two driveways were constructed upon premises situated in Honokowai, Maui, owned by Island Finance, Ltd., a reputable corporation in accordance with such custom and practice."

Plaintiff also obtained the affidavit of the Highway Construction and Maintenance Superintendent, who deposed that in November 1961, when the Plaintiff inquired about the paving work he "clearly indicated to the undersigned that Island Finance, Ltd., would pay for the cost of such work . . . " In fact, on February 13, 1962, eleven days after sending the bill in the sum of $401.76 to "Mr. Thomas Tagawa, President of Island Finance, Ltd." the county received a check from the corporation in full payment of the costs for labor, equipment and materials for paving the driveways.

Meanwhile, on March 21, 1962, the Defendant filed a motion to dismiss on the ground that the complaint failed to state a claim upon which relief can be granted, and a motion for summary judgment on the theory that there is no genuine issue as to any material fact.[1] Both motions were denied by the trial court on October 19, 1962.

However, after *New York Times Company v. Sullivan*, 376 U.S.

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[1]The summary judgment provision in the Hawaii Rules of Civil Procedure was patterned after Rule 56 of the Federal Rules of Civil Procedure as adopted in 1946 and does not contain the 1963 amendments to R.56, F.R.C.P. See Appendix 17-18.

254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), Defendant renewed its motion for summary judgment. The motion was granted on May 10, 1965, and Plaintiff appealed.

On April 27, 1967, the Supreme Court of the State of Hawaii reversed the decision of the Second Circuit Court, holding, inter alia, that under the present record, it could not "determine whether or not plaintiff could present a jury question on the issue of malice under *New York Times.*" *Tagawa v. Maui Publishing Co.*, 49 Haw. 675, at 686, 427 P.2d 79, at 85 (1967). The Court remanded the case to the trial court and directed that "the denial of the summary judgment be without prejudice to renewal of the motion for summary judgment on the making of an additional showing." 49 Haw., at 688, 427 P.2d, at 86.

On May 24, 1967, Defendant filed a second motion for summary judgment and submitted the affidavits of Earl Tanaka, its news editor, who had been responsible for publishing the newspaper, and John McConkey, the writer of the libelous column. Both employees expressed their good faith in publishing the column.

Plaintiff filed a counter affidavit and the depositions of Tanaka and McConkey which contained evidence showing, inter alia, that:

1. Defendant's news editor had personally known Plaintiff for eight years and had always known him to be honest, but he did not attempt to verify the libelous allegations of the column.
2. Defendant's columnist had personally seen County employees paving Plaintiff's driveway, but did not attempt to check on the business arrangement between Plaintiff and the County because he did not care whether or not Plaintiff would in fact pay for the work.

On July 10, 1967, Defendant's motion was heard, at which time Plaintiff objected to the admission of Defendant's affidavits on the basis that they contained hearsay and opinion, and were self-serving. Nonetheless, on July 17, 1967, the trial court granted summary judgment. Plaintiff again appealed.

On December 3, 1968, by a majority of three to two, the Hawaii Supreme Court affirmed the lower court decision on the ground that the affidavits and depositions presented were sufficient to remove the issue of "actual malice" from this case. (Append. 6)

Pursuant to this opinion, judgment was entered on February 25, 1969, and it is from this judgment that Plaintiff seeks a writ of certiorari.

REASONS FOR GRANTING THE WRIT

Appellant respectfully requests that certiorari be granted for the following reasons:

I. The Hawaii Supreme Court decided an important question of constitutional law which has not been, but should be decided by this Court.

   A. Summary judgment, which deprives a plaintiff of a jury trial, should be carefully used under the actual malice test of the First and Fourteenth Amendments.

   B. Because of the large number of public officials throughout the United States, the propriety of summary judgment under the actual malice test is a recurring issue.

   C. There is some conflict between cases as to the adequacy of certain evidence to grant summary judgment to a defendant under the actual malice test.

II. The Hawaii Supreme Court decided an important question of constitutional law in a way in conflict with applicable decisions of this Court.

III. The Hawaii Supreme Court erroneously applied the "actual malice" standard when it upheld the grant of summary judgment for the defendant newspaper in this case.

I.

THE HAWAII SUPREME COURT DECIDED AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE DECIDED BY THIS COURT.

This Court has not directly considered whether under the "actual malice" requirement of the First and Fourteenth Amendments summary judgment may be granted a defendant, thereby depriving the plaintiff of a jury trial, solely on the basis of the defendant's good

faith pronouncements. In *New York Times Co. v. Sullivan, supra,* and the spate of libel cases following it, this Court dealt with lower court decisions which were reached only after a full trial on the issue of actual malice.

A. Summary judgment, which deprives a plaintiff of a jury trial, should be carefully used under the actual malice test of the First and Fourteenth Amendments.

The "actual malice" test as required by freedom of speech and of the press already places a heavy burden on the public official plaintiff. Permitting the use of summary judgment under this test without authoritative guidelines from this Court adds to the plaintiff's burden because the First and Fourteenth Amendments could then be exploited by the defendant to eliminate the safeguards of confrontation and cross-examination guaranteed the plaintiff in a trial by jury.

For example, the Hawaii Supreme Court relied heavily upon the defendant's statement of good faith at the time of publication in finding that there was no issue of actual malice for a jury to decide. Under this decision, what is there to prevent any clever defendant, who had published the defamation with "serious doubts," from making self-serving statements of good faith to obtain summary judgment?

The likelihood of such abuse and injustice is not remote. The actual malice test inherently involves the publisher's state of mind at the time of publication, *New York Times Co. v. Sullivan,* 376 U.S., at 286-288, 84 S.Ct., at 729-730, and proving a particular state of mind is very difficult. The plaintiff would need some time and money to conduct an investigation which could reveal any evidence pertaining to the defendant's state of mind. Without such time and finances, a public official would be at the mercy of the defendant's self-serving statements. Hence, adequate safeguards must exist to protect all public officials from the grant of summary judgment solely on the basis of the defendant's good faith pronouncements.

B. Because of the large number of public officials throughout the United States, the propriety of summary judgment under the actual malice test is a recurring issue.

The significance of the problem is underscored by the fact that "public official" is broadly defined. This Court has stated:

> ". . . the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs," *Rosenblatt v. Baer*, 383 U.S. 75, at 85, 86 S.Ct. 669, at 676, 15 L.Ed.2d 597 (1965).

In the State of Hawaii alone, there are thousands of persons who would be classified as a "public official" under the *Rosenblatt* definition. This number multiplies to the hundreds of thousands, if not more, when public officials in the other fifty states are included. Consequently, the lack of adequate guidelines on the grant of summary judgment in a libel suit has a far-ranging effect nationally.

In addition, the United States is experiencing a period of vociferous dissent and outspoken criticism against "the establishment," of which public officials are a definite part. Although a record of all libel suits filed last year in the United States by public officials is not available, there is evidence that at least twelve such cases were decided in 1968 by courts in various jurisdictions besides Hawaii.[2] Four of those cases involved the applicability of summary judgment under the "actual malice" test. In 1967, at least ten libel cases brought by public officials were decided, four of which considered the summary judgment issue.[3] Thus the problem of the propriety of summary judgment under the "actual malice" test is a recurring one in this country.

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[2]See West's General Digest, Fourth Series, 1969, v. 7 and v. 8, Nos. 1-3, key nos. 10(1), 48(2) and 51(5).

[3]*Id.*, 1968, v. 4-6, and 1967, v. 3, key nos. 48(2), 51(5) and 112(2).

C. There is some conflict between cases as to the adequacy of certain evidence to grant summary judgment to a defendant under the actual malice test.

Finally, guidelines are especially needed at this time to resolve the conflict existing between courts which have considered the question of whether summary judgment to a defendant in a libel suit brought by a public official should be granted.

In *Washington Post Co. v. Keogh,* (CA D.C., 1966), 365 F.2d 965, *cert. den.* 385 U.S. 1011, 87 S.Ct. 708 (1967), the Court of Appeals for the District of Columbia Circuit affirmed the grant of summary judgment to the defendant newspaper. The court noted that to support its motion for summary judgment, the defendant had submitted the depositions of three employees and the affidavits of its editor and an assistant managing editor expressing their good faith in the publication of the column. 365 F.2d, at 969. The plaintiff's evidence was his own affidavit which "neither related to the information contained in the column nor contradicted the depositions and affidavits of the Post personnel." *Id.*

A contrary result was reached in the Seventh Circuit in *Pape v. Time, Incorporated* (CA 7, 1965), 354 F.2d 558. *cert. den.* 384 U.S. 909 (1966), where summary judgment for the defendant was reversed in order to submit the issue of actual malice to a jury. 354 F.2d, at 560-561. The evidence showed that the plaintiff had deposed that "he did not know anyone at Time, and, in fact, he does not claim the article was published with any deliberate attempt to harm him." 354 F.2d, at 560, but the court acknowledged that "actual malice" could still be determined from the manner in which the alledgedly libelous column had been written and published by the defendant. *Id.*

Admittedly, the contrary result between *Keogh* and *Pape* may possibly be explained on the factual differences between them. Still, in reaching its decision, the Seventh Circuit appears to have placed a greater emphasis on the actual conduct of the defendant. On this basis, summary judgment in a libel action brought by a public official seems more difficult to obtain in the Seventh Circuit than in the District of Columbia Circuit.

On the district court level, the United States District Court for

the Southern District of New York denied summary judgment to defendant magazine publishers in *Goldwater v. Ginzburg* (S.D. N.Y., 1966), 261 F.Supp. 784, because, inter alia, the issue of actual malice deals with the "state of mind of defendants" and "plaintiff ought to be able to have their testimony before the trier of fact in open court on cross-examination." 261 F.Supp., at 788. Further, in reaching its decision, the court stated:

> "There are significant differences between the case at bar and *Washington Post Co. v. Keogh*, 365 F.2d 965 (D.C. Cir. 1965), but if there were not I would decline to follow that decision." *Id.*

In *Hill v. Cantor*, (E.D. Tenn., 1965), 38 F.R.D. 503, the U.S. District Court for Eastern Tennessee also denied the defendant's motion for summary judgment because the issue of actual malice is for the "trier of facts" to determine. Further, summary judgment should not be granted "where, although the basic facts are not in dispute, parties in good faith may disagree nevertheless about the inferences to be drawn from the facts." 38 F.R.D., at 504.

Again, in *Raffa v. Shilbury* (N.Y. App.Div., 1965), 24 AD2d 814, 263 N.Y.S.2d 876, the New York court affirmed the denial of summary judgment for a defendant because the issue of actual malice was in dispute. The court came to this conclusion solely by noting the disagreement between defendant's affidavit and plaintiff's allegation in the complaint.[4]

In *Eadie v. Pole*, (N.J. App.Div., 1966), 91 N.J. Super. 504, 221 A.2d 547, the New Jersey appellate court reversed the summary judgment for the plaintiff and ruled, inter alia, that the issue of actual malice "was necessarily one for resolution by the jury" even where the defendant had denied any actual malice.

However, in at least two states besides Hawaii, a defendant may obtain summary judgment under the actual malice standard. In *Phifer v. Foe* (Wyo., 1968), 443 P.2d 870, the Supreme Court of Wyoming applied the actual malice test to a plaintiff who was a candidate for office, and affirmed the summary judgment granted

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[4]See also: *Keogh v. New York Herald Tribune, Inc.* (N.Y. County Supreme Court, 1966), 51 Misc.2d 888, NYS2d 302.

to the defendant. The court based its decision, inter alia, on the fact that publication of the allegedly defamatory article could possibly have stemmed from "a motive other than one conceived in actual malice" and that the plaintiff had failed to produce any evidence by affidavits, depositions or otherwise, which would show that the defendant had published the article with actual malice. 443 P.2d, at 871-872.

Also, in *Suchomel v. Suburban Life Newspapers, Inc.* (Ill. 1968), 40 Ill. 32, 240 NE2d 1, the Illinois Supreme Court upheld the summary judgment granted to the defendant. The court found that the plaintiff had not filed any affidavits or depositions in opposition to the motion for summary judgment, but that the plaintiff merely relied on the pleadings.

In summary, the foregoing discussion notes that certain courts are not in agreement as to the type and amount of evidence required under the actual malice test to justify the grant of summary judgment to a defendant in a defamation action brought by a public official. This situation not only leads to forum shopping, but also to considerable confusion in the law regarding the availability of summary judgment in such cases. Further, the lack of authoritative guidelines sets an atmosphere conducive to the abuse of summary proceedings, thereby fostering injustice. Finally, the large number of public officials in the United States makes the probem a particularly serious one.

II.

THE HAWAII SUPREME COURT DECIDED AN IMPORTANT QUESTION OF CONSITUTIONAL LAW IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

Although this Court has not directly dealt with the issue whether summary judgment may be granted a defendant under the actual malice test of the First and Fourteenth Amendments solely on the defendant's expressions of good faith, dictum in *St. Amant v. Thompson*, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262, (1968), strongly suggests that summary judgment should not be granted on that ground:

> "The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith." 390 U.S., at 732, 88 S.Ct., at 1326.

Furthermore, this Court has unequivocably ruled that summary judgment is improper in those cases where the motive and intent of the defendant is significantly involved. While those cases were not defamation actions, they are pertinent to the instant case because, as noted earlier, the basis of the issue of actual malice in a libel suit pertains to the defendant's motive and intent, or "state of mind" at the time of the publication of the libel.

Accordingly, in *Sartor v. Arkansas Natural Gas Corporation*, 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967 (1944), this Court reversed the summary judgment granted the defendant by the lower court. It held that summary judgment was improper where the only evidence to support the defendant's contention that there were no triable issues was contained in the affidavits of eight persons, each of whom was either "an officer of the defendant or is a lessee, or is an employee or officer of a lessee corporation engaged like defendant in gas production." 321 U.S., at 624-626, 64 S.Ct., at 727-728.

Then, in *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962), this Court also reversed the summary judgment granted by the lower court with a warning:

> " . . . summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. *Trial by affidavit is no substitute for trial by jury* which so long has been the hallmark of 'even handed justice.' " 368 U.S., at 473, 82 S.Ct., at 491. Emphasis added.

Poller was subsequently clarified in *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 88 S.Ct. 1575, 20

L.Ed.2d 569 (1968),[5] where summary judgment for a defendant in an antitrust suit was upheld. The Court explained that *Poller v. Columbia Broadcasting System, supra,* did not prohibit the granting of summary judgment in all antitrust cases. 391 U.S., at 289-290, 88 S.Ct., at 1593. Rather, summary judgment was correct in this case because the plaintiff, unlike plaintiff Poller, could not produce "substantial factual evidence" tending to show that the defendant was part of a conspiracy to eliminate a competitor. 391 U.S., at 285-290, 88 S.Ct., at 1591-1593. Significantly, the Court also noted the "overwhelming amount" of evidence of non-conspiratorial motives on defendant's part, much of which had been supplied by the plaintiff himself. 391 U.S. at 277, 88 S.Ct., at 1587.

These cases essentially indicate that summary judgment may not be granted a defendant where motive and intent is a crucial issue and the evidence of defendant's good faith is based solely on its own uncorroborated affirmations.

III.

THE "ACTUAL MALICE" STANDARD WAS ERRONEOUSLY APPLIED

This Court has ruled that freedom of speech and of the press as guaranteed by the First and Fourteenth Amendments

> " . . . prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' - - that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan,* 376 U.S., at 279-280, 84 S.Ct., at 726.

The "reckless disregard" concept of the "actual malice" test was later clarified to mean false statements made with a "high degree

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[5]This case was not brought to the attention of the Hawaii Supreme Court because all briefs in the instant case were filed prior to the announcement of the Court's decision.

of awareness" of their falsity. *Garrison v. Louisiana,* 379 U.S. 64, at 74, 85 S.Ct. 209, at 216, 13 L.Ed. 2d 125 (1964); *Curtis Publishing Co. v. Butts,* 388 U.S. 130, at 146, 87 S.Ct. 1975, at 1991, 18 L.Ed.2d 1094 (1967). Also, to constitute recklessness, the defendant must have "in fact entertained serious doubts as to the truth of his publication" at the time of such publication. *St. Amant v. Thompson,* 390 U.S., at 731, 88 S.Ct., at 1325 (1968).

More specifically, the Court stated that proof of ill will or the intent to inflict harm *by itself* is constitutionally insufficent under the actual malice test to hold a publisher liable for a defamatory article. *Garrison v. Louisiana,* 379 U.S., at 78, 85 S.Ct., at 217; *Henry v. Collins,* 380 U.S. 356, at 357, 85 S.Ct. 992, at 993; 13 L.Ed.2d 892 (1965); and *Rosenblatt v. Baer,* 383 U.S., at 84, 86 S.Ct., at 675. Emphasis added. In addition, "(f)ailure to investigate does not *in itself* establish bad faith." *St. Amant v. Thompson,* 390 U.S., at 733, 88 S.Ct., at 1326; *New York Times Co. v. Sullivan,* 376 U.S., at 287-288, 84 S.Ct., at 729-730. Emphasis added.

However, the Court has not determined that actual malice could not exist in a situation which includes the facts involved in the instant case:

1. Defendant's editor harbored ill will against the plaintiff and had threatened to "blast" the plaintiff prior to the publication of the column.
2. Defendant's news editor failed to investigate the allegations even though he had personally known the plaintiff for eight years and had always known the plaintiff to be honest.
3. Said news editor had adequate time and opportunity to verify the allegations since the column was submitted to him one full day prior to publication and he did not have any other columns to check on that day.
4. The method of verification would have been simple and the cost of verification would have been minimal, if not negligible.
5. Said news editor had been employed by the defendant since 1939.

6. Defendant's writer refused to verify the allegations because he did not care whether or not his allegations were in fact true.

7. Said writer implied that paving work done by the County was one factor mentioned in a critical letter by certain prominent citizens as contributing to the high cost of County government when in fact the said letter made no mention of paving costs.

8. Defendant did not submit any evidence on the reliability of its writer as a political observer or critic.

These facts show that in the instant case neither the existence of ill will, nor the failure to investigate on the part of the defendant stands by itself as proof of actual malice. The record contains other significant elements, and coupled to them proof of ill will and the failure to investigate should not be deemed constitutionally deficient under the actual malice test.

Specifically, the above facts indicate that defendant's news editor had a sound reason for verifying the libelous allegations. Yet, he did not do so, although verification would not have been costly, time-consuming or inconvenient. A reasonable interpretation of such failure to investigate is that despite his knowledge of plaintiff's integrity the news editor published the column because said news editor did not want to jeopardize his position and career by acting in a manner contrary to his editor's wishes. Thus, was the publication actually done in good faith, or with "serious doubts" of its truth?

The facts in this case also reveal defendant's writer to have been totally disdainful of whether the charges in the column were true or false. Apparently, he was only interested in printing the allegations. This kind of attitude was considered to be a factor in determining actual malice in *Mahnke v. Northwest Publications, Inc.* (Minn. 1968), 160 N.W.2d 1, at 13, and in *Goldwater v. Ginzburg*, 261 F.Supp., at 787.[6]

The absence of any facts in the letter criticizing the high cost of county government to support the implication of defendant's writer

[6]Lower court cases in this section are cited merely to show the difference in views as to what factors are considered pertinent to the issue of actual malice between them and the instant case.

that such high costs were partly caused by the paving work done by the county for private citizens indicate an attempt by the writer to make the column more interesting or sensational. A discrepancy of this kind was deemed pertinent to the issue of actual malice in *Pape v. Time, Inc.*, 354 F.2d, at 560, and summary judgment for the defendant was reversed.

Finally, the reliability of the writer was a significant factor in *Washington Post Co. v. Keogh*. There was evidence in the record that the columnist was an experienced and generally reliable writer whose forte was politically controversial topics. 365 F.2d, at 972. The defendant in the instant case has not proven that its writer was similarly reliable or competent, thereby making defendant's reliance on his allegations reasonable.

Thus, Plaintiff-Petitioner contends that the Hawaii Supreme Court misconstrued the "actual malice" test and that *New York Times Co. v. Sullivan* and its progeny do not require summary dismissal of the case at bar. The net effect of the foregoing facts is that the defendant could have published the column with "serious doubts" and the plaintiff is entitled to a trial by jury to resolve the issue of actual malice.

CONCLUSION

For the reasons outlined above the Petitioner respectfully requests that a writ of certiorari be granted to correct the injustice in the instant case and to establish guidelines as to the propriety of summary judgment under the actual malice test of the First and Fourteenth Amendments.

Respectfully submitted,

MEYER M. UEOKA
2121 Main Street
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Attorney for Petitioner

UEOKA & VAIL
Of Counsel

In The

SUPREME COURT OF HAWAII

October Term, 1968

THOMAS T. TAGAWA

v.

MAUI PUBLISHING COMPANY, LTD.

No. 4689

APPEAL FROM THE SECOND CIRCUIT COURT, HON. TAKASHI KITAOKA, JUDGE.

December 3, 1968

RICHARDSON, C. J., MARUMOTO, ABE AND LEVINSON, J. J. AND CIRCUIT JUDGE FELIX ASSIGNED BY REASON OF VACANCY.

Libel and Slander – "actual malice" – summary judgment.

Where plaintiff is a public official and defendant is a newspaper publisher which published an allegedly defamatory column about plaintiff's official conduct, summary judgment for defendant may be granted where defendant shows through uncontroverted depositions and affidavits that the publication was made without deliberate falsification and without a high degree of awareness of the probable falsity of the statements in the publication; in such instance, there is no genuine issue of "actual malice" for trial.

Same – same.

"Actual malice" consists of "deliberate falsification" of facts or "reckless disregard" of the truth, *i.e.*, reckless publication despite a high degree of awareness, harbored by the publisher, of the probable falsity of the published statements.

Same – same – investigatory failure.

An investigatory failure alone on the part of the publisher, without a high degree of awareness of probable falsity, may raise the issue of negligence but not the issue of "actual malice."

Same – requirement of good faith publication.

Defendant in a defamation action brought by a public official cannot automatically insure a favorable verdict solely by professions of good faith and a belief in the truth of the statements published, where there are obvious reasons to doubt the veracity or accuracy of the statements.

OPINION OF THE COURT BY RICHARDSON, C. J.

This is an appeal by plaintiff, a public official, from an order granting summary judgment to defendant newspaper publisher on the basis that there was no genuine issue as to "actual malice" as required by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

The facts that gave rise to this action are detailed in our previous decision involving these same two parties, *Tagawa v. Maui Publishing Co.*, 49 Haw. 675 (1967). In short, defendant published a column on January 13, 1962, in which it was stated that a Maui News columnist had seen road equipment owned by the county government paving driveways to two rental homes owned by plaintiff's finance company. Plaintiff, at that time a member of the Maui County Board of Supervisors, was known as "Tom Tagawa" and used the campaign slogan "Honest Tom." The column, in its conclusion, noted that the Board of Supervisors had recently attributed an increase in county government costs to wage increases for

county workers, but not to "the increased cost of paving materials * * *." "Did you perchance forget that, Honest Tom?" the column asked.[1]

Plaintiff filed a libel action against the publisher as sole defendant[2] on January 26, 1962, alleging, inter alia, that the column conveyed to readers the impression that plaintiff had dishonestly used his official position for personal gain. Plaintiff furnished an affidavit from the county engineer stating that it was standard practice for the county to perform minor work on private driveways when county equipment was being used in the immediate area. Only an oral agree-

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[1]The entire column read as follows:

"Country Chirps . . .

By a Westside Bird

"Such a lovely rain as we have been having this past week end! Such a far cry from the 26-inch deluge in November. I do hope that not only does it cause growth in grass, plants and sugar cane but also in plans for the new bridge across Kahana Stream. This relatively simple little structure should not require hours and hours of engineering and the detour is rough, narrow and either dusty or sloppy with mud! Right now the dirt used to fill up the holes has worked out and one can hardly go over five miles per hour if one expects to have any teeth left.

"A few days ago I saw County road equipment grading and paving the driveways into those two new rental houses at Honokowai. You know, the ones owned by Tom Tagawa's company. For my tax dollar I would much prefer to see the County equipment used to fix up the rutting detour mentioned in the paragraph above. My own drive does not happen to need paving so I can honestly say I'd rather have the detour fixed up. Of course some of you readers with muddy driveways might prefer to have yours fixed up. All a matter of personal need, I guess.

"The letter from the Citizens Committee for Good Government regarding the astronomical increases in County Government costs was most thought-provoking. It drew a most indignant reply from our Supervisors who blamed all increases on the wage raises forced on the County by the Legislature. In reading the newspaper account I fail to see any mention of the increased cost of paving materials as well. Did you perchance forget that, Honest Tom?"

[2]As we noted in the prior *Tagawa* decision, *supra* at 677, "[D]efendant makes no contention that its responsibility is any different from that of the writer of the column, and we shall proceed on the assumption that the legal relationship between the writer and defendant is immaterial."

ment that payment would be forthcoming was required of reputable persons. Plaintiff also furnished an affidavit indicating that he had made such an agreement in November 1961. Payment for the county's services was rendered on February 13, 1962.

The trial court, on October 19, 1962, denied defendant's motion to dismiss for failure to state a cause of action and an alternative motion for summary judgment. The court ruled that there was a genuine issue of fact as to whether there was "malice."[3]

On March 9, 1964, the U. S. Supreme Court rendered its decision in *New York Times Co. v. Sullivan, supra.* Defendant, therefore, filed a motion to reconsider the motions to dismiss and for summary judgment on the ground that, according to *New York Times,* the Maui News column was protected by the First Amendment guarantees of freedom of speech and of the press as applied to the States by the Fourteenth Amendment. The *Times* case held that these constitutional guarantees prohibit a public official from recovering damages for defamatory falsehood relating to his official conduct "unless he proves that the statement was made with 'actual malice' - - that is, with the knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. 254, 279-80.

The trial court granted the motion for summary judgment under the *Times* rule. We reversed and remanded without prejudice to the renewal of the motion for summary judgment on the making of an additional showing by defendant that there was no "actual malice." *Tagawa v. Maui Publishing Co., supra* at 688. We ruled that, while plaintiff has the burden at trial of piercing defendant's First Amendment protection by showing knowledge of falsity or reckless disregard of the truth, on a motion for summary judgment the movant, here the defendant, has the burden of marshaling a record showing that if the case went to trial there would be no issue for the jury. *Id.* at 683-84.

Depositions were then taken of John McConkey, the columnist, and Earl Tanaka, the news editor, who edited the column imme-

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[3]The court also ruled that there were two other issues of fact: whether the matter presented in the column was false, and whether the article could be understood by the average reader as conveying the meaning ascribed to it by plaintiff.

diately prior to publication. The gist of McConkey's deposition was that he personally saw the work being done on the driveways and that on or prior to the publication of the column he had no knowledge of plaintiff's arrangement to pay for the improvement. He admitted that he assumed the work was not being paid for and that he made no investigation to find out if any arrangement for payment had been made. McConkey also filed an affidavit stating that the column was written in good faith and that prior to publication he had no knowledge that any of the facts included in the column were false. Tanaka filed an affidavit to the same effect. In his deposition, Tanaka stated that he read the column but did not check with county officials to determine whether plaintiff had agreed to pay.

Plaintiff filed an affidavit in which he stated that there was an editorial published on the same day as the column calling him "tender-skinned" and that on a previous occasion, in October 1961, the editor of the Maui News had told him, "You are trying to be too big for your size * * *. You know I can blast you."

The trial court found from these additions to the record that there would be no genuine issue as to "actual malice" if the case went to trial, and summary judgment was granted to defendant. Plaintiff appeals from that judgment. The question before us is whether the depositions and affidavits presented are sufficient to remove the issue of "actual malice" from this case.

When *Tagawa* first came to us, we examined *New York Times* and a string of subsequent cases refining the *Times* test of "actual malice." We found, under *Walker v. Courier Journal*, 368 F.2d 189, 191 (6th Cir. 1966), that the persons claiming injury must not be prevented from adducing proof which could present a jury question on the issue of "actual malice," where no affidavits or depositions were filed which may have removed this issue from the case. By contrast, we noted, under *Washington Post Co. v. Keogh*, 365 F.2d 965, 969 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967), that summary judgment for the newspaper-defendant was granted when the newspaper "filed depositions of three employees and affidavits by its editor and an assistant managing editor indicating that before publication each of the *Post* personnel deposing had read

* * * the columns [that were the basis of the libel action] and had no reason to believe or evidence causing them to suspect the information contained in them was false." We stated that on the record of the *Tagawa* case at that time *Washington Post* did not apply.

We now hold that where plaintiff is a public official and defendant is a newspaper publisher which published an allegedly defamatory column about plaintiff's official conduct, summary judgment for defendant may be granted where defendant shows through *uncontroverted depositions and affidavits* that the publication was made without deliberate falsification and without a high degree of awareness of the probable falsity of the statements in the publication; in such instance, there is no genuine issue of "actual malice" for trial.

"Actual malice" has become a term of art clearly distinguishable from the ordinary definition of "malice" in terms of ill will, a basis for the trial court's original denial of defendant's motion for summary judgment. "Actual malice" consists of "deliberate falsification" of facts or "reckless disregard" of the truth, *i.e.*, reckless publication despite a high degree of awareness, harbored by the publisher, of the probable falsity of the published statements. *New York Times Co. v. Sullivan, supra* at 279-80; *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 153 (1967). An investigatory failure alone on the part of the publisher, without a high degree of awareness of probable falsity may raise the issue of negligence but not the issue of "actual malice."[4] *New York Times Co. v. Sullivan, supra* at 287-88; *Washington Post Co. v. Keogh, supra* at 966-67, n.1; *Curtis Publishing Co. v. Butts, supra* at 153-54; *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 83-85 (1967). In other words, mere negligence is not "actual malice."

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[4]This type of investigatory failure, where the publisher does not harbor a high degree of awareness of the probable falsity of a statement, is obviously different from the investigatory failure that is involved when a publisher takes an anonymous telephone call and publishes a statement relying entirely on the call. In this latter case, the publisher is deemed to be well aware of the probability of falsity. See the discussion of publication based on an anonymous call in *St. Amant v. Thompson*, 88 S.Ct. 1323 (1968), *infra* at 13.

In *Times* itself, the Supreme Court stated that a failure on the part of the newspaper to check facts in the publication, an advertisement, against stories in its own files and through phone calls to alleged sponsors of the advertisement may have been enough to give rise to an issue of fact on negligence, but that failure was not enough to give rise to an issue of fact on "actual malice." The investigatory failure was considered a constitutionally impermissible basis for a libel action by a public official where the *Times* personnel involved had filed affidavits and offered testimony disclaiming any knowledge of falsity in the advertisement. *New York Times Co. v. Sullivan, supra* at 260-61, 285-86; *see also, Washington Post Co. v. Keogh, supra* at 966-67, n. 1. Similarly, in the *Post* case where a nationally syndicated column by Drew Pearson allegedly defamed a Congressman, the affidavits and depositions by the publisher's employees and editors disclaiming knowledge of alleged falsity in the charges in the column were sufficient to support the summary judgment.

The Supreme Court acknowledged in *St. Amant v. Thompson*, 88 S.Ct. 1323 at 1326 (1968), that the "reckless disregard" test, synonymous of course with the "actual malice" test, may be open to the charge that it "puts a premium on ignorance, encourages the irresponsible publisher not to inqure, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity." However, the court explicitly rejected a proposed alternative that publishers meet the standard of a reasonable man or a prudent publisher. A standard of reasonableness or prudence would not adequately implement the First Amendment freedoms of speech and of the press, since it would lead to "self-censorship" by publishers in matters concerning public business and the conduct of public officials. The Court concluded, "To insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones." *Id.* at 1326.

In the case at hand, the uncontroverted depositions and affidavits of McConkey and Tanaka are sufficient to show that "actual malice," as defined by *Times* and its progeny, is not genuinely at

issue. McConkey, who had been a regular Maui News columnist on a free-lance basis for about 12 years, observed the county equipment at work on plaintiff's property and assumed that plaintiff was not paying for the work. Without checking with the county officials, McConkey wrote a column implying that increased county costs might be attributed to "increased paving costs." The column was then edited by Tanaka, who did not verify McConkey's statements but passed the column along for publication. Unbeknownst to McConkey and Tanaka, plaintiff, as a reputable person in the community, had already contracted with the county officials to have the work done.

Plaintiff argues that a simple telephone call by McConkey or Tanaka to the officials would have uncovered this fact, but the rule as seen above, is that a mere investigatory failure is not sufficient to meet the standard of "actual malice."

Through his last affidavit, plaintiff tries to show that there was a coupling of the investigative failure with a high degree of awareness of the probably falsity of the statements in the column. He contends that the column, along with the editorial, was part of a malicious attack by the Maui News on his character. However, this contention goes to the issue of "malice" in the sense of ill will, not "actual malice." An editorial arising from "bad or corrupt motive" or from "personal spite, ill will or desire to injure the plaintiff" does not, ipso facto, meet the "actual malice" standard. *Beckley Newspapers Corp. v. Hanks, supra* at 82. More importantly, there is no evidence in the record that the Maui News deliberately falsified the column or that it published the column while harboring a high degree of awareness as to the probable falsity of the statements contained therein.

At the same time, the U.S. Supreme Court has not said, as defendant here maintains in its brief: "Even if defendant was gunning for plaintiff, the First Amendment makes him fair game." As Mr. Justice Fortas, speaking figuratively in *St. Amant v. Thompson, supra* at 1327, stated: "The First Amendment does not require that we license shotgun attacks on public officials in virtually unlimited

open-season. The occupation of public office-holder does not forfeit one's membership in the human race."[5]

The Court, in the same case, set out express limitations of the "actual malice" test. It held that the defendant in a defamation action brought by a public official cannot automatically insure a favorable verdict solely by professions of good faith and a belief in the truth of the statements published, where there are obvious reasons to doubt the veracity or accuracy of the statements. *Id.* at 1326.

> Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. *Id.* at 1326.

If a column by a writer like McConkey had been purely a figment of his imagination, then the issue of "actual malice" would have arisen, summary judgment for defendant would have been denied and the case would have been tried. Also, if the columnist had called the county officials and had been told that the work would be paid for, but had gone ahead and published the article, then "actual malice" would have been an issue. However, the record indicates that these developments did not take place.

It is unfortunate that the column may have caused damage to the reputation of a public official and that he may have had to spend hours explaining his version of the road-paving to his constituents, especially without the advantage of a mass media form of communication like a newspaper. But the law is clear on the point that "actual malice" requires much more than mere malice in terms of ill will. Since there was no genuine issue regarding "actual malice,"

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[5]This quotation is from Mr. Justice Fortas' lone dissent in the *St. Amant* case. He did not question the validity of the *Times* rule itself, but dissented from the majority on the issue of applying the "actual malice" test to the particular facts of the *St. Amant* case, which facts he felt showed "reckless disregard."

we are compelled to conclude that the summary judgment was rightfully given.

Judgment affirmed.

John T. Vail and
Meyer M. Ueoka
for plaintiff-appellant.

J. Garner Anthony and
John H. R. Plews (Robertson,
Castle & Anthony of counsel)
for defendant-appellee.

DISSENTING OPINION OF ABE, J., WITH WHOM FELIX, J., JOINS.

I believe that the trial court erred when it granted summary judgment to the defendant and held that there was no genuine issue as to "actual malice."

Under the record of this case, I do not believe that the majority of this court can say that the issue of actual malice should not have gone to the jury. In an affidavit, plaintiff Tagawa pointed out that the defendant Maui Publishing Company, Ltd., printed an editorial calling plaintiff "tender-skinned" and that, on a previous occasion, in October 1961, the editor of the Maui News had told Tagawa ". . . you are trying to be too big for your size. You know I can blast you." The foregoing establishes an inference that Ezra Crane, editor of the Maui News, harbored ill feelings and malice toward plaintiff. This inference gives rise to another inference that John McConkey, Maui News columnist, to carry out this threat deliberately falsified the facts or with reckless disregard of the facts, wrote and had the article in question published. The fact that adequate investigation was not made as to the ascertainment of the true facts is an element to which a jury would have given consideration to determine the issue of "actual malice."

It was held in *Tagawa v. Maui Publishing Co.*, 49 Haw. 675, 427 P.2d 79 (1967) that *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) is applicable in this case. *New York Times Co. v. Sullivan, supra*, held that the First Amendment guarantees of freedom of speech and of the press as applied to the states by the Fourteenth Amendment prohibited "a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

It is conceded that investigatory failure *alone* may raise the issue of negligence but not the issue of actual malice. However, under the record of this case, it can not be said that investigatory failure was the sole issue before the trial court.

Therefore, under the *New York Times* test for actual malice, this case presents a clear issue as to actual malice. The depositions

and affidavits of McConkey, Tanaka, and plaintiff Tagawa show that actual malice is genuinely at issue. The court should not have summarily determined from these self-serving affidavits in the light of Tagawa's affidavit that the article was published in good faith and not with malice.

It should be noted that the affidavits in question would not have been admissible in evidence. Then, if both McConkey and Tanaka were to testify and if the trial court had permitted them to testify as stated in the affidavits, it would have been for the jury to decide whether any, and if any what weight is to be given their testimony.

As stated by the U.S. Supreme Court in *Aetna Life Insurance Co. v. Ward,* 140 U.S. 76, 88 (1891):

> "The jury were the judges of the credibility of the witnesses . . . and in weighing their testimony had the right to determine how much dependence was to be placed upon it. There are many things sometimes in the conduct of a witness upon the stand, and sometimes in the mode in which his answers are drawn from him through the questioning of counsel, by which a jury are to be guided in determining the weight and credibility of his testimony. That part of every case, such as the one at the bar, belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men . . . . "

The issue before the court is whether there was actual malice and this issue involves a subjective state of mind. I believe that where the issue involves a subjective state of mind, the trial court should not decide this question on a motion for summary judgment based on self-serving affidavits.

In *Washington Post Co. v. Keogh,* 365 F.2d 965 (D.C. Cir. 1966), *cert. denied,* 385 U.S. 1011 (1967), the court at page 967 said:

> "A motion for summary judgment should be granted where it is shown that no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. In deciding whether a genuine issue of fact is raised in any case, a number of general considerations are

> relevant. First, the right to trial by jury is at stake, so courts must be ever careful to grant summary judgment only when no issue of fact is controverted or turns upon a choice between permissible inferences from undisputed evidence. [Citations omitted] This need for care has given rise to the valid generalizations that summary judgment must be denied when there is 'doubt' whether an issue of fact has been raised, and that summary judgment is not usually appropriate when the issue raised concerns a subjective state of mind."

In *Goldwater v. Ginzburg*, 261 F. Supp. 784 (S.D.N.Y. 1966), at 788 the court said:

> "The issue of actual malice on the part of defendants seems peculiarly inappropriate for disposition by summary judgment because it concerns 'motive, intent, and subjective feelings and reactions.' [Citations omitted] The Supreme Court has cautioned against summary judgment 'where motive and intent play leading roles.' *Poller v. Columbia Broadcasting Co.*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962)."

Further, I believe that Tagawa's affidavit raises an inference that the article in question was published with actual malice and therefore the trial court erred in granting summary judgment for defendant.

The U.S. Supreme Court in *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620 (1944), in holding that the trial court erred in granting summary judgment under Rule 56 of the Rules of Civil Procedure solely upon opinion affidavits of experts said at pages 628-629:

> "We think the defendant failed to show that it is entitled to judgment as matter of law. In the stipulation, the bulletin, the affidavit of the plaintiffs' attorney and the admission of its witnesses, there is some, although far from conclusive, evidence of a market price or a value, under the rules laid down by the Court of Appeals, that supports plaintiffs' case. It may well be that the weight of the evidence would be found on a trial to be with defendant. But it may not withdraw these witnesses from cross-examination, the best method yet devised for test-

> ing trustworthiness of testimony. And their credibility and the weight to be given to their opinions is to be determined, after trial, in the regular manner."

St. Amant v. Thompson, 389 U.S.____, 88 S.Ct. 1323 (1968), cited in the majority decision I believe also supports this position, as the court said at page 1326:

> "The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."

The majority decision in this case at page 11 reads to wit:

> "If a column by a writer like McConkey had been purely a figment of his imagination, then the issue of 'actual malice' would have arisen, summary judgment for defendant would have been denied and the case would have been tried. Also, if the columnist had called the county officials and had been told that the work would be paid for, but had gone ahead and published the article, then 'actual malice' would have been an issue. However, the record indicates that these developments did not take place."

Now, how can the record of the case where there was no trial establish or indicate "these developments?" How can the majority court hold those facts would not or could not have been brought forward at the trial? Weren't these facts to be proven at the trial? Plaintiff not having been given an opportunity to prove his case, is the majority court correct in stating that as the facts showing "actual

malice" were not indicated on the record the trial court did not err in granting summary judgment to the defendant?

The majority court, I believe, in its zealousness to protect one's constitutional right of freedom of the press guaranteed by the United States and Hawaii Constitutions is trampling upon another's constitutional right to a trial by jury also guaranteed by both constitutions.

This court in *Abraham v. Onorato Garages*, ___ Haw. ___, ___ P.2d _____ (1968), at page_____stated:

> "In considering the validity of the granting of summary judgment under H.R.C.P. Rule 56(c), the appellate court must determine whether any genuine issue as to a material fact was raised and whether the moving party was entitled to judgment as a matter of law. *Richards v. Midkiff*, 48 Haw. 32, 39, 396 P.2d 49, 54 (1964). The inferences drawn from the underlying facts alleged in the materials (affidavits, testimony, exhibits) considered by the court in making its determination must be viewed in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962);"

Here the defendant Maui News Publishing Co. is the moving party and I believe viewing the record, the affidavits and depositions in the light most favorable to the plaintiff, there is a genuine issue as to actual malice and the plaintiff is entitled to a trial by jury on that issue.

The summary judgment in favor of defendant precludes plaintiff from presenting his case to the jury on the issue of actual malice thereby not only denying plaintiff his day in court, but also his right to a trial by jury.

I would reverse.

No. 4689

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1968

THOMAS T. TAGAWA,
Plaintiff-Appellant,

v.

MAUI PUBLISHING COMPANY, LTD.,
a Hawaii corporation,
Defendant-Appellee.

APPEAL FROM CIRCUIT COURT, SECOND CIRCUIT
HON. TAKASHI KITAOKA, JUDGE PRESIDING

JUDGMENT ON APPEAL

Pursuant to the Opinion of the Supreme Court rendered herein on December 3, 1968, and the decision denying the petition for rehearing filed on February 20, 1969, the judgment of the lower court is affirmed.

DATED: Honolulu, Hawaii, February 25, 1969.

BY THE COURT:

/s/ Samuel K. Makekau
Clerk

APPROVED:

/s/ William A. Richardson
Chief Justice

HAWAII RULES OF CIVIL PROCEDURE

Rule 56. Summary Judgment.

(a) FOR CLAIMANT. A party seeking to recover upon a claim, counterclaim, or a cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) FOR DEFENDING PARTY. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) CASE NOT FULLY ADJUDICATED ON MOTION. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the

trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) FORM OF AFFIDAVITS; FURTHER TESTIMONY. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) WHEN AFFIDAVITS ARE UNAVAILABLE. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) AFFIDAVITS MADE IN BAD FAITH. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.